

# ARKANSAS SUPREME COURT

No. CR 08-841

KENNETH ALLAN BRITT  
Appellant

v.

STATE OF ARKANSAS  
Appellee

**Opinion Delivered** November 20, 2008

PRO SE MOTION FOR EXTENSION  
OF TIME TO FILE APPELLANT'S  
BRIEF AND APPELLEE'S MOTIONS  
TO DISMISS APPEAL AND FOR  
EXTENSION OF TIME TO FILE BRIEF  
[CIRCUIT COURT OF LONOKE  
COUNTY, CR 2005-28, HON. LANCE  
L. HANSHAW, JUDGE]

MOTION TO DISMISS APPEAL  
DENIED; APPELLANT'S MOTION  
FOR EXTENSION OF TIME MOOT;  
APPELLEE'S MOTION FOR  
EXTENSION OF TIME GRANTED.

## PER CURIAM

A jury found appellant Kenneth Allan Britt guilty of manufacturing methamphetamine, possessing drug paraphernalia with intent to manufacture methamphetamine, and fleeing, and sentenced him to an aggregate term of 240 months' imprisonment in the Arkansas Department of Correction. The Arkansas Court of Appeals affirmed the judgment. *Britt v. State*, CACR 07-103 (Ark. App. Nov. 7, 2007), petition for review denied CR 07-1224 (Ark. Feb 7, 2008) (per curiam). Appellant filed in the trial court a petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition, and appellant lodged an appeal of that order in this court.

Appellant filed a motion in which he seeks an extension of time to file his brief. Since filing

the motion, and prior to expiration of the time allowed to file his brief, appellant filed his brief. The State has filed a motion to dismiss the appeal, asserting that appellant's Rule 37.1 petition was not timely filed. The State has also filed a motion requesting an additional fifteen days in which to file appellee's brief should its motion to dismiss be denied.

An appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Smith v. State*, 367 Ark. 611, 242 S.W.3d 253 (2006) (per curiam). If appellant's Rule 37.1 petition was not timely filed, the trial court could not grant postconviction relief and it would be clear that appellant could not prevail.

Where the judgment was appealed, as it was in this case, Arkansas Rule of Criminal Procedure 37.2(c) requires that the petition for postconviction relief must be filed within sixty days of the date the mandate issued. Here, the mandate from the decision by the court of appeals issued on February 7, 2008. Appellant's petition was file-marked seventy-one days after that date, on April 18, 2008.

The time limitations imposed in Rule 37.2(c) are jurisdictional in nature, and the circuit court may not grant relief on an untimely petition. *Womack v. State*, 368 Ark. 341, 245 S.W.3d 154 (2006) (per curiam). If the petition were not timely filed, then the trial court could not consider the merits of the petition, and appellant could not prevail on appeal. In this case, however, it is clear from the record that the filing date marked on the petition, April 18, 2008, was in error. Correspondence from the circuit clerk indicates that appellant tendered the petition along with a motion to proceed *in forma pauperis* on April 2, 2008, fifty-five days after the mandate issued. When the order was entered granting appellant status as a pauper, the clerk marked the petition as filed on the date the order was entered, April 18, 2008. It was, however, a clerical error not to mark the petition as filed

on the date the petition was properly tendered with the motion. *Cf. Arbaugh v. A.G. Processing, Inc.*, 358 Ark. 432, 191 S.W.3d 539 (2004) (per curiam) (date of tender for petition for review held to be the date of filing where the filing fee was paid after date petition was due); *see also White v. State*, 373 Ark. 415, \_\_\_ S.W.3d \_\_\_ (2008) (per curiam) (holding that to delay filing of a notice of appeal because a request had been submitted to proceed *in forma pauperis* would in effect deny indigent appellant the right to appeal); *Larimore v. State*, 327 Ark. 271, 938 S.W.2d 818 (1997) (holding that where postconviction relief is provided, due process requires the proceeding to be fundamentally fair). The trial court did not err in considering the merits of the petition.<sup>1</sup>

Because the petition was not untimely, we deny the State's motion to dismiss the appeal. Appellant's motion is moot because he has timely filed his brief since filing the motion. The State's motion for additional time in which to file appellee's brief is granted. Appellee's brief is due to be filed in this court within fifteen days of the date of this opinion.

Motion to dismiss appeal denied; appellant's motion for extension of time moot; appellee's motion for extension of time granted.

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<sup>1</sup> The State argues that even though appellant tendered the petition with his motion to proceed *in forma pauperis* within the time limitations of Rule 37.2, appellant was required to seek relief from this court in order to proceed with his petition, and that the State cannot waive the jurisdictional defect. But, there was no jurisdictional defect to be waived because the date marked on the petition was not in fact correct. It is true that questions of subject-matter jurisdiction are always open and cannot be waived. *State v. Boyette*, 362 Ark. 27, 207 S.W.3d 488 (2005). A question of loss of jurisdiction can be raised by either party at any time, and may be raised by a court on its own motion. *Id.* The trial court treated the petition as timely, despite the date indicated on the petition as the date it was filed. Appellant was not required to request permission from this court to proceed.